JUL 15 1970
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 401

JAMES ROBERTSON,

Petitioner,

versus

M/S SANYO MARU, Her engines, tackle, apparel and furniture, and SAWAYAMA KISEN, K.K.

Defendants.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNGAR, DULITZ & MARTZELL
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IN THE
SUPREME COURT OF THE UNITED STATES
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No. _____

JAMES ROBERTSON,
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M/S SANYO MARU, Her engines, tackle, apparel, and furniture, and SAWAYAMA KISEN, K.K.,
Defendants.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

James Robertson the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 15, 1970.

CITATIONS TO OPINIONS BELOW

The oral Findings of Fact and Conclusions of Law and the final decree adopting these Findings of Fact and Conclusions of Law of the Judge of the United States District Court, Eastern District of Louisiana, Section C are printed in Appendix "A" and "B" and they are unreported.

The Opinion of the Judge of the United States District Court, Eastern District of Louisiana, Section C entering judgment against petitioner James Robertson and in favor of defendant SANYO MARU, her engines, tackle, apparel and furniture and SAWAYAMA KISEN, K.K. is printed as Appendix "C" and is reported at 293 F.Supp. 931.

The Opinion of the United States Court of Appeals for the Fifth Circuit printed in Appendix "D" is reported at 424 F.2d 520.

The Judgment of the United States Court of Appeals for the Fifth Circuit is printed as Appendix "E" and is unreported.

No application for rehearing was filed.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, Section 1254(1) United States Code.

JURISPRUDENCE INVOLVED

(1) *Mascuilli v. United States*, 387 U.S. 237.
(2) *Candiano v. Moore-McCormack Lines, Inc.* (2 Cir.) 382 F.2 961
(3) *Alexander v. Bethlehem Steel Corp.*, (2 Cir.) 382 F.2d 963.
(4) *Cleary v. United States Lines*, (2 Cir.) 411 F.2d 1009
(5) *Venable v. A S Forenede Dampskelesselskab*, (4 Cir.) 399 F.2d 347

(6) *Grigsby v. Coastal Marine Service of Texas, Inc.*, (5 Cir.) 412 F.2d 1011

(7) *Luckenbach Overseas Corporation and Isthmian Lines, Inc. v. Usner*, (5 Cir.) 413 F.2d 984.

(8) *Duncan v. Transeastern Shipping Corporation*, (5 Cir.) 413 F.2d 1023.

(9) *Tim v. American President Lines, Ltd.*, (9 Cir.) 409 F.2d 385.

STATEMENT OF THE CASE

On May 25, 1961 James Robertson, Plaintiff-Appellant, was employed by the Texla Stevedoring Company as a longshoreman to operate a winch in the course of unloading operations of the SANYO MARU, a vessel owned and operated by Respondent-Appellee Sawayama Kisen, K.K. In order to get into the No. 5 hatch it was necessary to remove the "hatch beams" with the two steam winches at the No. 5 hatch. James Robertson was operating the inshore winch at that time. During the course of this removal of one of the hatch beams, the beam struck James Robertson causing considerable injury to his right foot and leg. Suit was brought against the SANYO MARU and the Sawayama Kisen, K.K. by James Robertson alleging the unseaworthiness of the SANYO MARU by reason of the malfunctioning of the winch being operated by Robertson and the negligence of Sawayama Kisen, K.K. Sawayama Kisen, K.K. impleaded Robertson's employer, Texla Stevedoring seeking indemnity. The matter was tried before Honorable Alvin B. Rubin, United States District Judge for the Eastern District of Louisiana and

resulted in judgment for the Respondent Sawayama Kisen, K.K. on the grounds that the cause of the accident was the joint fault of James Robertson and the other winch runner, Charlie Jackson. From that judgment James Robertson appealed to the United States Court of Appeals which affirmed District Court. *James Robertson v. SANYO MARU* (5 Cir.) 424 F.2d 520.

From that decision of the United States Court of Appeals for the Fifth Circuit, James Robertson now seeks a Writ of Certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The District Court squarely faced the issue of whether or not the joint negligence of two longshoremen which resulted in the injury of one of them resulted in unseaworthiness held that under the decisions of the United States Court of Appeals for the Fifth Circuit operational negligence was not to be equated with unseaworthiness. 293 F. Supp. 931. That decision was affirmed by the United States Court of Appeals for the Fifth Circuit. 424 F.2d 520. The United States Courts of Appeals are divided on whether the "operational negligence" of a stevedore is defense to a claim of unseaworthiness by a longshoreman against the vessel.

The United States Courts of Appeal have given directly opposite interpretations of this Court's per curiam opinion in *Mascuilli v. United States*, 387 U.S. 237. The result is that maritime workers in New York and Baltimore can achieve recovery for their injuries

and maritime workers in New Orleans and San Francisco can be denied recovery for their injuries on the same set of facts.

The issue is whether the negligent act of a stevedore or an individual longshoreman renders a vessel unseaworthy in light of the *Mascuilli* decision or on the basis of sound law whatever *Mascuilli* may mean. See *Waldron v. Moore-McCormack*, 386 U.S. 724. The Second Circuit and the Fourth Circuit say that it does. *Candiano v. Moore-McCormack Lines, Inc.* (2 Cir.) 382 F.2 961; *Alexander v. Bethlehem Steel Corporation*, (2 Cir.) 382 F.2d 963; *Cleary v. United States Lines*, (2 Cir.) 411 F.2d 1009; *Venable v. A S Det Forenede Dampskilesselskab* (4 Cir.) 399 F.2d 347. The Fifth Circuit and the Ninth Circuit say that it does not. *Grigsby v. Coastal Marine Service of Tex. Inc.*, (5 Cir.) 412 F.2d 1011; *Luckenbach Overseas Corporation and Isthmian Lines, Inc. v. Usner* (5 Cir. 1959) 413 F.2d 984; *Duncan v. Transeastern Shipping Corporation*, (5 Cir. 1969) 413 F.2d 1023; *Tim v. American President Lines, Ltd.*, (9 Cir.) 409 F.2d 385.

This Court has granted certiorari on a similar issue in *Usner v. Luckenbach Overseas Corporation and Isthmian Lines, Inc.*, Supreme Court of the United States, October Term No. 675. Petitioner submits that on a precise finding of fact in the instant case and a thorough analysis of the law by the District Court affirmed by the Court of Appeals the precise issue is presented to this Court and that the conflict among the Circuits regarding the impact of the *Mascuilli* case

should be resolved by granting certiorari in the instant case.

CONCLUSION

This is the classic judicial confrontation which supports the certiorari jurisdiction of this Court. The maritime law controlling four of the largest ports in the nation is in direct conflict. The maritime industry and those citizens who suffer injury while serving that industry deserve a uniform rule of law. This can only be achieved by this Court's issuing the writs requested by Petitioner and resolving the conflict.

Respectfully submitted,

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John R. Martzell

PROOF OF SERVICE

I, John R. Martzell, attorney for the petitioner and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

Leon Sarpy, Esq.
CHAFFE, McCALL, PHILLIPS, BURKE
TOLER, HOPKINS & SARPY
1500 National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

A. R. Christovich, Jr.
CHRISTOVICH & KEARNEY
American Bank Building
New Orleans, Louisiana 70130

by mailing a copy thereof, postage prepaid addressed to their respective offices, this ____ day of July, 1970.

John R. Martzell

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

JAMES ROBERTSON.

IN ADMIRALTY

versus. No. 4950

M/S SANYO MARU, HER ENGINES, TACKLE, APPAREL AND FURNITURE, AND SAWAYAMA KISEN, K.K.

Filed: Jul. 10, 1968

EXCERPT OF PROCEEDINGS

APPEARANCES:

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New Orleans, Louisiana
Attorney for third-party
respondents, Texia
Stevedoring Co. and
American Mutual Liab. Ins.
Company.

(The above entitled and numbered cause came up for hearing, on July 5, 1968, in the courtroom at 400 Royal Street, New Orleans, Louisiana, the HONORABLE ALVIN B. RUBIN, District Judge, presiding.)

PROCEEDINGS

AFTERNOON SESSION

THE COURT:

Gentlemen, I am going to ask the Reporter to take this down. He will type it for you apart from the regular transcript and it will be available for the prevailing parties to prepare findings of fact and to be used as a basis for them.

Let me say by way of preface, I think we ought to do in this case what I think we have done previously, I'll give the losing party or parties fifteen days within which to announce whether they have any desire to appeal. This is not to alter your statutory appeal limits, but if you indicate you have a desire to appeal, then I will ask the prevailing party to prepare detailed findings of fact and conclusions of law. In the absence, however, of any desire of anyone to appeal, I don't see any point in putting the prevailing party to work and the Court to the work of reviewing those findings of fact and conclusions of law, and these oral findings of fact will be transcribed and will become part of the record.

I perhaps should begin by saying, of course, neither I nor perhaps anyone else who has testified has any way to really know what happened on this afternoon seven years ago when this accident took place, and I don't believe the witnesses actually know what happened then, which is not to say that they have not at least in some instances, perhaps in all, have testified to the best of their knowledge and ability. It's simply a matter that after seven years none of our memories are infallible and our interests and desires and time and circumstances plays tricks with our memories. So I recognize that necessarily in deciding a factual issue by the testimony of fallible witnesses, given seven years later, when combined with the necessary fallibility of the adjudicatory process, means that what we get is not necessarily an accurate result, just the best one we can come to.

Proceeding on that assumption, I find that the plaintiff has failed to sustain by a preponderance of the evidence the burden on the plaintiff of showing that there was anything wrong with the winch on the day in question. I base that on a number of factors.

In part, I am influenced by the testimony of Mr. Jackson and by the fact that the winch in question was used uneventfully for the remainder of the day. Now, it's quite true that Mr. Jackson said he experienced some problems with that winch, but knowing human nature, knowing the nature of these accidents, knowing the nature of what goes on on the water front, I can't believe he used that winch the rest of the day after a man had been badly hurt, and experienced problems with it and didn't say anything about them. I am quite convinced from my own observations of Mr. Jackson on the witness stand, if he were in a position where someone else had been badly hurt by a failure on the part of this winch and if he thought that winch was failing again, he would have made his problems known immediately and loudly. So, this is one of the factors that influences my judgment.

A second factor, and quite persuasive to me, is the testimony of Mr. Lecourt. I believe that this boom was probably stationed in the usual position, and I have examined the sketch offered as Cook No. 1. I believe this attempt to show merely the angle, as Mr. Cook testified the letter "D" shown on here is clearly outside the square of the hatch, and it is quite clear, I think, from the testimony that the boom was somewhere within the square of the hatch whatever might

have been its relationship to the center line and, therefore, I place little significance on the location shown here. It would have been a manifest inefficiency and manifest, I think, to the operators themselves, to put this boom anywhere but somewhere close to the center line of the hatch, because this would have deprived them of its principle operative effect; the function of this boom being to lift, it couldn't have lifted efficiently if it had been over toward the port side of the vessel. And if we assume then, as Mr. Lecourt did, that the boom was close to but on the port side of the center line, then even a failure on the part of the steam would not have caused the accident to happen in the manner in which it did.

Finally, the third factual circumstance is — that I find highly creditable — the admittedly hypothetical construction of how the accident might have happened given by Mr. Lecourt. We had two experienced winch operators, but who had not worked together, that morning, and who just didn't get their efforts in conjunction, and if we assume that Mr. Robertson began to lift before Mr. Jackson did and consequently got the boom high in the air belatedly, Mr. Jackson put the power to the winch and suddenly his end swung off and then Mr. Robertson, doing what was customary, began to slack off immediately, we would get the swinging motion that would be necessary to bring the beam forward, striking Mr. Robertson, as nobody can doubt that it did. So for all these reasons I find that the plaintiff has not shown by a preponderance of the evidence that there was a defect in the winch.

By way of a side here, and because it may ultimately be necessary to deal with this in the findings of fact, I place little credence either on the statements given by Mr. Melton that there was nothing wrong with the steam or on his statements made from the witness stand that there was something wrong with the steam. I do not place much credence in Mr. Melton's testimony. I indicated to counsel in a conference in chambers that I don't think this was because of any deliberate efforts on the part of Mr. Melton to tell something other than the truth. I think from my judgment of him and my appraisal of his testimony, he is a person who has some difficulty in distinguishing what happened seven years ago from his mental recreation of the events, and that he is testifying about something, with respect both to the accident and the statement, that exists in his mind truthfully according to what he sees in his mind, but perhaps untruthfully or inaccurately, more properly, with respect to what happened. So, I don't, as I say, place much credence or much reliability on the statement that Mr. Adams typed down that Mr. Melton saw nothing wrong with the steam or there was nothing wrong with the winch, because I don't think Mr. Melton would have known that there was nothing wrong, and I place little credence in his testimony now that everything failed all of a sudden.

What causes me some doubt about the case, gentlemen, and the point at which I want to ask counsel to submit further memoranda, really relates to whether or not the Maseuilli case has any applicability here. Although I have not re-read that case in the light of

this case, as I recall the facts there, what was happening in the Mascuilli case was a lifting operation with some special gear that was adopted to lifting heavy tanks, a combination of ten winches, as I recall, an elaborate type of composite sling, and the tank being lifted dropped and, as I recall the District Court in finding fact in that case, found there was no failure on the part of the sling or the winches. And somehow or another, the Supreme Court in an opinion that I must confess I do not now understand, said that the decision should have been for the injured longshoreman, finding an unseaworthy condition on the part of the vessel.

Now, I have read and I'm acquainted with the Antoine decision, and I have read and I am acquainted with the Candiano decision. I don't know of any other recent decisions in this area by the Fifth Circuit subsequent to Antoine, but if there are, I would appreciate counsel calling them to my attention in the post-trial memorandum.

The area I have some doubt on is this:

If we assume that the accident was caused by the joint negligence of Mr. Robertson and Mr. Jackson in failing to combine and properly correlate their efforts in the operation of these two ship's winches, which were part of the ship's gear and which were being used to unload ship's cargo in a normal shipping function, if we assume that this is what happened, then is there unseaworthiness under the doctrine of the Mascuilli case?

Now, I find as a fact here that the accident was caused in this manner. I assumed, that is, it was caused by the joint negligence of Mr. Robertson and Mr. Jackson and by their failure to correlate their efforts in such a way as to bring this beam properly out of the hatch and starboard to the point on the vessel where it was to be deposited; and finding this as a fact, I'll give counsel time to submit memoranda with respect to whether under these facts a case is made out under Mascuilli and Candiano or indeed whether Candiano is applicable to this Circuit.

With respect to the issue of indemnity, I think there is no doubt that in either event indemnity is due the vessel.

If there is no judgment for the plaintiff here, then I think clearly indemnity is due, because the suit arises out of a claim of unseaworthiness by employees engaged by the stevedore, and the warranty of workmanlike performance under Ryan, as elaborated in the subsequent cases, I think clearly imposes liability on the stevedore to indemnify the vessel against the expense of defending these claims.

If there should be liability under the Mascuilli case, than under the findings of fact I have made, it seems to me that clearly this arises out of the operational acts of the employees of the stevedore, and again indemnity is owed.

I suppose I ought to say a word or two about the suggestion made in the testimony that something the

Japanese sailors or seamen did around the winch presumably might have caused something to happen or that they might have done something, too, after the accident to remedy whatever it was that happened. This is to me pure conjecture. If I accept as gospel the fact testified to that Japanese seamen came to the winch after the accident, there was some tools around but no one saw what they did, I cannot assume from that what I suppose the testimony was offered to suggest: That is, that these seamen realized something was wrong with the winch and, therefore, corrected it. This would be a flight into sheer fantasy. Nor can I accept as any more than fanciful, either the suggestion that by the attendance of the seamen earlier on the winch to oil it or to do whatever it was that they did, that they might have done something to it that disturbed its operation. I don't say that this could not have happened, but certainly it's within the realm of possibility, but I simply say which would be fifty-fifty if we had to do it in terms of percentages.

MR. MARTZELL:

Your Honor, in that same connection and given the jurisprudence with which the attorneys are going to have to deal, it might help if the Court could tell us whether or not it is going to — which of Mr. Cook's evaluations in time from the moment of first lifting the beam out of the slot until the accident, I think the Court in citing the case to us known what problem we are confronted with.

THE COURT:

I find that the whole sequence of events was quite

brief in time, that there was some lapse of time from start to finish, but I don't think as much as five minutes.

I do not believe that there were two separate and distinct operations, as Mr. Robertson now seems to recall. I don't believe they got the beam lifted part way, it began to swing, they steadied it and started up again; I think there was one continuous series of events beginning with the time that Mr. Robertson applied power and Mr. Jackson didn't, followed by Mr. Jackson's application of power and Mr. Robertson slacking off, and that this is what caused the accident; and I must, therefore, conclude that although these events follow closely on each other, they were separate, and I would say they followed within perhaps a minute or a minute and a half of each other, as Mr. Cook testified, certainly that there was not a five-minute interval between the time they started to lift this beam and the time the unfortunate accident happened, because, as we all know, in times like this events move very quickly and what seems to be an eternity to the observer is very short on the clock. I think his estimate of a minute or a minute and a half is a pretty good one, and in the absence of something better, I would adopt that.

Is there anything further that you gentlemen would like to suggest?

MR. SARPY:

No.

MR. CHRISTOVICH:
No, your Honor.

THE COURT:
Thank you very much, gentlemen, I hope you have a pleasent holiday for the rest of what remains of a long week end.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

JAMES ROBERTSON,
Plaintiff,
(IN ADMIRALTY)
versus
No. 4950
SECTION "C"

SANYO MARU, her engines, tackle, apparel and furniture, and SAWAYAMA KISEN, K.K.,
Defendants,
versus
TEXLA STEVEDORING COMPANY,
Third-Party Defendants.

FINAL DECREE

Filed: Apr. 17, 1969

On motion of SAWAYAMA KISEN, K.K., claimants of the S/S SANYO MARU, and upon suggestion to the

Court that Findings of Facts, Conclusions of Law, and Judgment thereon have previously been entered in this case,

And on further suggestion that they do desire that a final decree be entered herein;

IT IS ORDERED, ADJUDGED AND DECREED that a final decree be and is hereby entered in this case on this 19th day of April, 1969.

New Orleans, La.

(Signed) ALVIN B. RUBIN
UNITED STATES
DISTRICT JUDGE

Respectfully submitted:
CHAFFE, McCALL, PHILLIPS,
BURKE, TOLER & SARPY
(Signed) PAUL A. NALTY
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Attorneys for Sawayama Kisen, K.K.

CERTIFICATE

I hereby certify that a copy of the above and foregoing pleading has been this day forwarded to all counsel of record by depositing a copy thereof, postage

prepaid, in the United States mail on this 16 day of April 1969.

CHAFFE, McCALL,
PHILLIPS, BURKE, TOLER
& SARPY
(Signed) PAUL A. NALTY

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

JAMES ROBERTSON,

Plaintiff*,

ADMIRALTY

versus

No. 4950

SECTION "C".

SANYO MARU, her engines, tackle, apparel and furniture, and SAWAYAMA KISEN, K. K.,

Defendants,

versus

TEXLA STEVEDORING COMPANY,

Third-Party Defendants.

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*Although this is a pre-1966 Admiralty case and the parties should be referred to as libelant, respondents, and third party respondents, in this opinion they are referred to as plaintiff, defendants and third party defendants in accordance with current practice.

John R. Martzell, Esq.
Attorney for Plaintiff
Leon Sarpy, Esq.
Attorney for Defendants
Paul A. Nalty, Esq.
Attorney for Defendants
A. R. Christovich, Jr., Esq.
Attorney for Third-Party Defendants

RUBIN, District Judge:

Theologians once debated how many angels might stand on the head of a pin. Metaphysicians trained in such a tradition may find it possible to rationalize the decisions dealing with the extent to which a shipowner is liable for injuries to longshoremen caused by unseaworthiness brought about by the acts of fellow longshoremen.[1] The analyst must consider the decision in *Sieracki*[2] that a longshoreman engaged in ship's work has a cause of action against the shipowner for unseaworthiness, as well as the decision in *Crumady v. The Joachim Hendrik Fisser*[3] that the unseaworthiness on which such a suit is predicated can result from the negligence of other longshoremen.

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[1]See Venable v. A/S Det Forenede Dampskibsselskab, 4 Cir. 1968, 399 F.2d 347; the cases cited at 1967-68, 14 Loyola L. Rev. 176 n. 16; La Capria v. Compagnie Maritime Belge, S.D.N.Y. 1968, 286 F.Supp. 980; and Cleary v. United States Lines Company, S.D.N.Y. 1967, 287 F.Supp. 601.

[2]Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946).

[3]358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413 (1959).

The shipowner's liability, in any event, is passed on to the stevedore under the *Ryan* doctrine by virtue of the stevedore's warranty to perform the contract in a workmanlike manner.[4] But the stevedore is insulated from damage suits instituted by its longshoremen-employees by the provisions of the Longshoremen's and Harbor Workers' Compensation Act ("LHWA"). The Act provides that the longshoreman's sole remedy against his employer, the stevedore, is a claim for compensation benefits.[5]

Thus, under the *Sieracki-Ryan-Crumady* triad, the stevedore becomes liable to the shipowner when one of its employees is injured as the result of unseaworthiness brought about by the negligence of its other employees. The liability is indirect, but it is nonetheless real. The stevedore's statutory immunity from tort claims by its own employees endures today only when a longshoreman is injured by the negligence of a fellow longshoreman that does not result in unseaworthiness; in that event sole relief to the injured longshoreman is against his employer under the LHWA.

Meanwhile, the current of decisions expanding the doctrine of unseaworthiness has carried us to the point where we know that it may be occasioned by an act of negligence,[6] that it may be transitory in nature,[7]

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[4]Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956).

[5]44 Stat. 1424, 1927, 33 U.S.C. §§ 901-50. *See particularly*, 33 U.S.C. §905.

[6]Crumady v. The Joachim Hendrik Fisser, note 3 *supra*.

[7]Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960).

and that it encompasses the failure to provide a reasonably safe place to work even when the hazardous condition was created instantaneously.[8] The necessity for mapping a line between negligence that does not result in unseaworthiness and negligence that does result in unseaworthiness and for articulating the factors to be considered has launched an armada of cases, not all of them completely consistent. Their chartings have been analyzed, dissected, and postmortemmed.[9] The delicacy of the line raises the question whether there can ever be negligence that does not result in unseaworthiness.

In *Mascuilli v. United States*,[10] the United States Supreme Court granted a writ of certiorari in a case that appeared to involve this issue, but its per curiam was so succinct that it has enabled lawyers to read into it what they will. Some interpret *Mascuilli* merely as finding unseaworthiness under the facts presented. Others view it as meaning that "operational negligence renders the vessel [per se] instantaneously unseaworthy."[11]

In the present case, I have found as a fact that there was no defect in the vessel or its equipment. The plaintiff's injury was caused by the joint negli-

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[8] Mascuilli v. United States, 387 U.S. 237, 87 S.Ct. 1705, 18 L.Ed.2d 743 (1967).

[9] *See*, e.g., Note, 1967-68, 14 Loyola L. Rev. 176 and Note, 42 Tul. L. Rev. 648 (1968).

[10] See note 8, *supra*.

[11] The quote is from a comprehensive student note, 14 Loyola L. Rev. 174 (1968), in which the author concludes, ". . . no such significant and far-reaching change in the law was intended in *Mascuilli*." *Id.* at 187.

gence of the plaintiff and another winch operator in failing properly to correlate the operation of the two winches. The plan or method of operation was a safe one; it was negligently executed.[12]

In an effort to determine whether this case presented the issue of unseaworthiness, the court asked counsel to brief the question:

> Assuming that the cause of the injury to Robertson was the joint negligence of Robertson and Jackson, the winch runners, in operating the winches, does the negligence create unseaworthiness for which the shipowner is responsible in damages to Robertson?

Counsel for all parties submitted excellent briefs. While there is still doubt in my mind about what course is indicated, I have concluded that, unless negligence is to be equated with unseaworthiness, there was no unseaworthiness here, and hence recovery must be denied.

Mitchell v. Trawler Racer, Inc.[13] tells us that negligence and unseaworthiness are to be differentiated. The duty to provide a seaworthy vessel is not a duty to insure the safety of the seaman. It is a duty "only

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[12] *Cf.* Cleary v. United States Lines Company, S.D.N.Y. 1967, 287 F.Supp. 601; La Capria v. Compagnie Maritime Belge, S.D.N.Y. 1968, 286 F.Supp. 980; Taylor v. S.S. Helen Lykes, E.D. La. 1967, 268 F.Supp. 932, 935 n. 8; Lee v. M/S Insco Jem, N.D. Fla. 1966, 259 F.Supp. 670.

[13] 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960).

to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354."[14]

The negligent misuse of safe and sufficient equipment may render a vessel unseaworthy. Waldron v. Moore-McCormack Lines, Inc., 1967, 386 U.S. 724, 727, 87 S.Ct. 1410, 18 L.Ed.2d 482; Crumady v. The Joachim Hendrik Fisser, 1959, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413; Venable v. A/S Det Forenede Dampskibsselskab, 4 Cir. 1968, 399 F.2d 347; Alexander v. Bethlehem Steel Corp., 2 Cir. 1967, 382 F.2d 963; Candiano v. Moore-McCormick Lines, Inc., 2 Cir. 1967, 382 F.2d 961; Grillea v. United States, 2 Cir. 1956, 232 F.2d 919. But as the per curiam in the petition for rehearing in *Venable* points out, not "every instance of operational negligence necessarily creates liability under the unseaworthiness doctrine."[15] If "the manner in which the longshoremen performed their duties resulted in an unseaworthy condition,"[16] then the vessel owner (and his indemnitor the stevedore) are liable. While "... every act of negligence, no matter how short lived, creates an unsafe condition for those exposed to it,"[17]

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[14]Id. at 550, 80 S.Ct. 933, 4 L.Ed.2d at 948-49.

[15]399 F.2d at 355.

[16]399 F.2d at 356.

[17]Cleary v. United States Lines Company, S.D.N.Y. 1967, 287 F.Supp. 601, 604 (quoting from Reid v. Quebec Paper Sales & Transp. Co., 2 Cir. 1965, 340 F.2d 34, 37).

it does not necessarily create an unseaworthy vessel.[18] The lesson of *The Trawler Racer* is that negligence cannot be equated with unseaworthiness. Just as there may be unseaworthiness in the absence of negligence, there may be negligence that does not result in unseaworthiness.[19]

The eventual solution to the problem created by the exposure of longshoremen to the various risks attendant upon stevedoring a vessel is legislative. Until, however, Congress acts to revise the statutory structure, admiralty courts must thread their way through the fog without clear charts.

The ancient adoption of seamen as the wards of admiralty and the current extension of the scope of the warranty of seaworthiness, both to afford broader protection to blue water sailors and to extend protection to longshoremen who perform sailor's duties, combine to afford much broader relief to the injured longshoremen. The longshoreman is engaged in an occupation as hazardous as any in modern industry; his work-life expectancy on the wharves has been said to be as short as seven years.

The distress flag of the vessel owner is more apparent than real. The true burden of affording relief

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[18] If it did, the vessel owner would be required to warrant a vessel free of negligence, making it the virtual insurer of the safety of longshoremen. Compare Mitchell v. Trawler Racer, Inc., note 7 *supra*, "the owner is [not] obligated to furnish an accident-free ship." 362 U.S. at 550, 80 S.Ct. at 933, 4 L.Ed.2d at 948.

[19] Compare, dissenting opinion in *Venable*, note 1 *supra*, 399 F.2d at 354-55.

to the injured longshoreman falls on the stevedore under his warranty, usually express but today certainly implied. But there should be a more sensible way to handle the allocation of the risk than the roundabout and uneconomic voyage that must now be sailed. The injured longshoreman should not be permitted (or required) to fling his net twice, once at his employer directly, another time in an effort to find unseaworthiness, vessel owner liability, and ultimate payment in damages to add to the limited statutory compensation. To the longshoreman injured on the job the difference between a hazard created by unseaworthiness and one created by negligence is hardly more intelligible than a chanty chorused in Sanskrit. He knows only that he has been hurt, at least in part by the act of someone else. If his injury came from something lawyers call unseaworthiness, he gets more money to supplement his compensation. If his injury comes from something these oracles call negligence, he is restricted to compensation. But at this moment a sensible course can be set only legislatively.

For the reasons rendered, judgment will be signed in favor of the defendant and against the plaintiff. There can be no doubt, however, that the vessel owner is due indemnity for the expenses of this litigation. Therefore judgment on the third party complaint will be rendered in favor of the defendant (the vessel owner) and against the third party defendant (the stevedore). This opinion, together with the findings of fact made at the conclusion of the evidence will serve in lieu of findings of fact and conclusions of law. A form of judgment will be prepared by counsel for defend-

ants and submitted to opposing counsel. If counsel are unable to agree on the form of judgment or the amount of indemnity due, they will notify the court.

(Signed) ALVIN B. RUBIN
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
April 1st, 1969

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28054

JAMES ROBERTSON,
Plaintiff-Appellant,
versus

SANYO MARU, her engines, tackle, apparel and furniture, and SAWAYAMA KISEN, K.K.,
Defendants-Appellees
versus

TEXLA STEVEDORING COMPANY,
Third-Party Defendants.

Appeal from the United States District Court for the Eastern District of Louisiana

(April 15, 1970)

Before JONES, BELL and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge: The appellant, a longshoreman, appeals from a second adverse judgment on his claim for personal injuries.

Following an earlier judgment dismissing plaintiff's claim against the vessel owner and the vessel owner's claim against the impleaded stevedore, the plaintiff appealed, and this court reversed on grounds not material.[1] On remand the District Court entered findings and conclusions in favor of the vessel owner and against the plaintiff and a judgment pursuant thereto. It found also that the stevedore was obligated to indemnify the vessel owner for expenses of litigation, but the record contains no judgment based thereon.

The appellant urges that there is plain error in the findings of fact of the District Court that there was no defect in the vessel or its equipment. Review of all the evidence discloses no plain error.

The injury to appellant occurred when he and an-

[1]Robertson v. Sanyo Maru, 374 F.2d 463 (5th Cir. 1967).

other longshoreman were each operating a steam winch at a hatch of the vessel. In a joint operation, utilizing the two winches, they were lifting a hatch beam, and as they commenced to raise the beam it swung and struck appellant. The trial judge found that the joint lifting maneuver was negligently executed by appellant and Jackson, the other winch operator. This gives rise to the second issue, whether the joint "operational negligence" of the two winch operators at the very moment of injury created instantaneous unseaworthiness by which the shipowner became liable to appellant under the *Ryan* doctrine. *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011 (5th Cir.), *pet. for cert. dism.*, ____ U.S. ____, 24 L.Ed. 2d 531 (1970), decided subsequent to the trial below is adverse to appellant on this issue.

The court found that the two winch operators failed to coordinate their efforts but that they were experienced winch operators. In his formal findings the District Judge did not find that the two operators had never worked together before, but in his oral findings announced at the conclusion of the trial he did so state. Assuming that we may consider this a finding for purposes of review, we do not consider it to impose liability for an unseaworthy crew under *Waldron v. Moore-McCormack Lines*, 386 U.S. 724, 18 L.Ed. 2d 482 (1967). If appellant's position were sound, crews composed of constantly changing but experienced and competent seamen, performing the diverse routine tasks aboard ship that require coordinated effort, would create a continuing liability for unseaworthiness until they had practiced together at their joint tasks

(presumably having to practice ashore and in performance of simulated duties to avoid unseaworthiness while doing so).

The stevedore tells us that it paid the expenses of the first district court trial, and it asserts that its responsibility for indemnity ended with the entry of the first decree, not appealed from by the vessel. It urges that it did not appear in the first appeal, and on remand it was not made a party by any subsequent pleadings, so that it can have no liability for additional costs of defense, in fact is not even a party.

There is nothing for us to review on this issue because no judgment has been entered thereon. The District Court is the place for the stevedore to raise the points which he makes.

The judgment in favor of the vessel is AFFIRMED. The case is REMANDED to the District Court on the issue of indemnity.

Costs are taxed one-half to the plaintiff, one-half to the vessel.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28054

D. C. Docket No. Adm. 4950 "C"

JAMES ROBERTSON,
Plaintiff-Appellant,
versus

SANTO MARU, her engine, tackle, apparel and furniture, and SAWAYAMA KISEN, K. K.,
Defendants-Appellees,
versus

TEXLA STEVEDORING COMPANY,
Third-Party Defendants.

Appeal from the United States District Court for the Eastern District of Louisiana.

Filed: May 11, 1970

Before JONES, BELL and GODBOLD,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the tr nscript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment in favor of the vessel of the said District Court in this cause be, and the same is hereby, affirmed; and that this cause be, and the same is hereby remanded to the said District Court on the issue of indemnity in accordance with the opinion of this Court.

It is further ordered that plaintiff-appellant be condemned to pay one-half of the costs in this Court, and defendants-appellees be condemned to pay one-half of said costs.

April 15, 1970

Issued As Mandate: MAY 8, 1970

PREME COURT, U. S.

AUG 17 1970

ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 401

JAMES ROBERTSON,

Petitioner,

versus

M/S SANYO MARU, Her engines, tackle, apparel and furniture, and SAWAYAMA KISEN, K.K.,

Defendants,

versus

TEXLA STEVEDORING COMPANY,

Third-Party Defendant.

OPPOSITION TO WRITS OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN BEHALF OF SAWAYAMA KISEN, K.K. AND TEXLA STEVEDORING COMPANY.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

JAMES ROBERTSON,
Petitioner,

versus

M/S SANYO MARU, Her engines, tackle, apparel and furniture, and SAWAYAMA KISEN, K.K.
Defendants,

versus

TEXLA STEVEDORING COMPANY
Third-Party Defendant.

OPPOSITION TO WRITS OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN BEHALF OF SAWAYAMA KISEN, K.K. AND TEXLA STEVEDORING COMPANY

May It Please The Court:

NOW COME Sawayama Kisen, K.K., as owners and claimants of the S/S SANYO MARU, and Texla Stevedoring

Company, and file this opposition to petition for certiorari by James Robertson, petitioner.

I.

SUMMARY STATEMENT OF THE CASE

This petition for a writ of certiorari by petitioner longshoreman is directed toward a judgment affirming an adverse judgment on liability from the District Court of the Eastern District of Louisiana rendered by the Honorable Alvin B. Rubin. This district judgment was the second judgment adverse to the petitioner, which was entered following the second trial of the same facts. At the first trial, District Judge Frank B. Ellis entered judgment against the petitioner after hearing all of the evidence on liability and held that the petitioner had failed to sustain his burden of proof. The Fifth Circuit Court of Appeals, however, reversed this decision in *James Robertson v. M/S SAYO MARU, her engines, tackle, apparel and furniture and Sawayama Kisen, K.K.* (No. 22-865) (5th Cir. 1967), 374 F.2d 463, on the sole question of an original statement not having been introduced into evidence.

On the second trial, this original document was filed in evidence and was therefore not at issue in the second appeal to the Fifth Circuit. Following a hearing on all of the evidence in the second trial, the Honorable Alvin B. Rubin entered judgment against the petitioner on liability and held that the petitioner had failed to sustain his burden of proof.

Following the second trial, the petitioner sought reversal of this second adverse judgment on liability by urging that the

finding of facts were clearly erroneous and maintained that the operational negligence which he brought into play created, as a matter of law, an unseaworthy condition.

Two separate trials on the same facts have resulted in identical conclusion of fact which have been the basis of both adverse judgments to the petitioner and these were simply that the petitioner had failed to sustain his burden of proof that the vessel was unseaworthy or that the shipowner was negligent.

In the present application for writs of certiorari, the sole and only issue raised is whether the operational negligence found by the Court for which the petitioner was responsible by operation of law resulted in unseaworthiness of the defendant's vessel for which the petitioner can recover damages. The petitioner has stated that the issue in this case is whether or not the joint negligence of two longshoremen resulting in injury to one of them is operational negligence which would be equated with unseaworthiness. Specifically, the petitioner has stated the issue as "whether or not the joint negligence of two longshoremen, which resulted in the injury of one of them, resulted in unseaworthiness." It is submitted that the statement that the negligence resulted in unseaworthiness is not consistent with the factual findings of the District Court which specifically held that the petitioner failed to sustain his burden of proving by a preponderance of the evidence that the vessel was unseaworthy. Therefore, unless the factual finding is clearly erroneous, the petitioner must rely on unseaworthiness resulting "as a matter of law" and not solely from the facts proven in the second trial.

It is quite clear from the District Court's decision that as a matter of fact, there was joint negligence of the petitioner and his co-worker but there was no finding that the vessel was

unseaworthy. In this petition, the petitioner attempts to reach the legal conclusion of the vessel's unseaworthiness, without any factual support, through a legal manipulation of the decision of *Mascuilli v. United States* and subsequent cases.

II.

OPERATIONAL NEGLIGENCE IS NOT PER SE UNSEAWORTHINESS AND THERE WAS NO NEGLIGENCE OR UNSEAWORTHINESS

Each case depends on the facts submitted to and found by the trial judge. Counsel for petitioner attempts to interpret the case of *Mascuilli v. United States*, 387 U.S. 237, 87 S. Ct. 1705, 18 L.ed 743 (May 22, 1967) so that any form of operational negligence creates unseaworthiness. This theory has not been accepted by even the Second Circuit as the per curiam decision shown in the petition for rehearing in *Candiano v. Moore-McCormack Lines, Inc.*, 386 F.2d 444 (2nd Cir. 1967) wherein the court discusses the present status of the law and indicates that an unseaworthy condition was created prior to the accident thereby changing their original interpretation of *Mascuilli*. In the instant case there is no unseaworthy condition which was created.

Further, this court has consistently denied certiorari in cases involving operational negligence and has allowed the circuit courts decision (and the trial courts decision) to remain undisturbed.

After the *Mascuilli* decision, which was decided on May 22, 1967, this court denied a petition for rehearing on October

9, 1967, in *Foster v. Lykes Bros. SS Co.*, 389 U.S. 889, 88 S. Ct. 15. On June 5, 1967 (two weeks after the *Mascuilli* decision) the Second Circuit's opinion in *Fenton v. I/S Glittre*, 370 F.2d 146 (2nd Cir. 1966) this court denied petition for writs of certiorari, 387 U.S. 944, 87 S. Ct. 2077. Petition for writ of certiorari to review this court's decision in *Infoine v. Lake Charles Stevedores, Inc.*, 376 F.2d 443 (5th Cir. 1967) was denied on October 9, 1967, 389 U.S. 869, 88 S. Ct. 145. Further, a petition for writ of certiorari to review the decision in *Dugas v. Nippon Yusen Kaisha*, 378 F.2d 271 (5th Cir. 1967 was denied on December 18, 1967, 389 U.S. 1021, 88 S. Ct. 592. In the last mentioned case this court permitted the filing of an amicus curiae brief by the American Trial Lawyers Association which specifically urged the court to reverse Dugas on the basis of *Mascuilli* but this court refused to grant certiorari.

We therefore respectfully submit that the court should similarly deny certiorari in this case which, in effect, would confirm this court's decision in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L.ed 2d 941 (1960) wherein the court provided that the ship owner does have a duty to provide a seaworthy vessel, and that this is an absolute duty, but further held that a vessel has a duty only to furnish a vessel and appurtenances reasonably fit for their intended use.

CONCLUSION

It is apparent that after two trials wherein the Court heard all of the evidence on liability, two separate District Courts have held that the petitioner has failed to maintain his burden of proving that the vessel was unseaworthy. Through an effort to read conclusions into the *Mascuilli* case, the petitioner seeks by

this writ of certiorari to have this Court alter the findings of fact and thereby carry for him his burden of proving that the vessel was unseaworthy.

A similar effort was made in the case of *Mose Reed v. M/V FOYLEBANK, her engines, tackle, apparel and furniture, and Bank Lines Limited and Strachan Shipping Company*, No. 894 of this Court, which this Court denied certiorari on the 24th day of February, 1970.

For the above and foregoing reasons, it is respectfully submitted that the petitioner's writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I certify that on this day I have served copies of the foregoing brief in opposition to petition for writ of certiorari on all counsel of record by mailing a copy thereof, postage prepaid, addressed to their respective offices, this ____ day of August, 1970.

PAUL A. NALTY